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SJC-13098

HAKEEM MUSHWAALAKBAR vs. COMMONWEALTH.

Suffolk. May 7, 2021. - June 9, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,
& Georges, JJ.

Pretrial Detention. Due Process of Law, Pretrial detainees.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on December 23, 2020.

Following transfer to the Appeals Court, the case was heard by Sydney Hanlon, J.

The Supreme Judicial Court granted an application for direct appellate review.

Patrick Levin, Committee for Public Counsel Services, for the petitioner.

Marina Moriarty & Benjamin Shorey, Assistant District Attorneys, for the Commonwealth.

Diana Fantasia & Shoshana E. Stern, Assistant District Attorneys, for District Attorney for the Plymouth District & another, amici curiae, submitted a brief.

LOWY, J. Hakeem Mushwaalakbar, to whom we shall refer in this opinion as the defendant, has been held in pretrial

detention for over eighteen months on charges arising out of the Chelsea and Lynn Divisions of the District Court Department (Chelsea District Court and Lynn District Court).¹ His trial in the Chelsea case was originally scheduled for March of 2020, but was delayed until June 2021, when he was acquitted of the charges. His trial in the Lynn case was scheduled for April of 2020, but it has been delayed since then due to the COVID-19 pandemic. The defendant has now been held for more than a year beyond his initial trial dates.

The defendant appeals from various orders regarding his pretrial detention status, arguing that this prolonged detention violates his due process rights. Deciding this issue requires that we revisit our holding in Commonwealth v. Lougee, 485 Mass. 70 (2020). There, we held that as of June 2020, when the case was decided, the length of pretrial detention caused by the delay of jury trials due to the COVID-19 pandemic had not yet reached the point of triggering a due process analysis. See id. at 84. Now, more than a year into the pandemic, we revisit that holding. Although we are heartened by successful resumption of jury trials in the Commonwealth, we recognize the possibility of

¹ In the Lynn case, the defendant is held on the basis of dangerousness under G. L. c. 276, § 58A. In the Chelsea case, the defendant was initially held on the basis of dangerousness, and then was held on a cash bail until June 2, 2021, when he was acquitted of the charges.

continued unforeseen delays, as well as the fact that in some cases the length of pretrial detention may have approached or exceeded the limits of constitutional due process.

Given that due process is flexible and fact-specific, the defendant is correct that a global remedy is inappropriate. The pretrial detention statutes already contain mechanisms for individual review of detention orders suited to the task. As we noted in Lougee, 485 Mass. at 81-82, the delays caused by the COVID-19 pandemic may constitute a changed circumstance within the meaning of G. L. c. 276, § 58A (4). Thus, defendants may seek individualized review whether their pretrial detention violates due process by filing motions for reconsideration under § 58A (4).

To guide trial court judges in analyzing whether a defendant's pretrial detention violates due process, we set out the following procedural framework. Defendants have a right to a hearing on motions for reconsideration under § 58A (4) if they have been held longer than the presumptive time periods in § 58A minus any periods of excludable delay other than delay due to the COVID-19 pandemic, and they make a preliminary showing on one or more of the following due process factors.

At the hearing, judges should weigh (1) the length of detention and the projected length of ongoing detention, (2) the existence and nature of a plea offer, (3) evidence supporting

detention under § 58A, (4) specific unfair prejudice to the defendant, and (5) the Commonwealth's responsibility for the delay.

Given that the defendant has now been acquitted in the Chelsea case, that case is moot. Regarding the Lynn case, we vacate the single justice's decision that no due process violation occurred and remand the matter to the Lynn District Court for proceedings consistent with this opinion.²

Background. 1. Lynn case. On October 1, 2019, a complaint issued out of the Lynn District Court charging the defendant with assault and battery on a family or household member (subsequent offense), G. L. c. 265, § 13M (b); and strangulation, G. L. c. 265, § 15D. The alleged victim in that case was the defendant's then girlfriend. A warrant issued for the defendant's arrest.

2. Chelsea case. A few weeks later, on October 23, 2019, police responded to a single-car accident in Chelsea. The occupants of the crashed car were the defendant and the same girlfriend. The girlfriend told police that the two had gotten into an argument that had escalated into a physical fight. The defendant was injured in the car crash and taken to

² We acknowledge the amicus letter submitted by the district attorney for the Plymouth district and joined by the district attorney for the Bristol district.

Massachusetts General Hospital. Upon discharge from the hospital, the defendant was placed under arrest. He was then arraigned in the Chelsea District Court for assault on a family or household member (subsequent offense), G. L. c. 265, § 13M (b); assault with intent to murder, G. L. c. 265, § 15;³ assault by means of a dangerous weapon, G. L. c. 265, § 15B (b); and strangulation, G. L. c. 265, § 15D. The defendant was ordered held without bail pending a dangerousness hearing.

3. Dangerousness hearings. After a dangerousness hearing in the Chelsea District Court on November 7, 2019, the defendant was held without bail. A Chelsea District Court judge found that no conditions or combination of conditions of release could suffice to protect the alleged victim or the public, noting the defendant's prior domestic violence cases, the pendency of the Lynn complaint, and three restraining orders that had been entered against the defendant.

On December 5, 2019, the defendant petitioned for review of the pretrial detention order in the Superior Court in Suffolk County. A Superior Court judge vacated the dangerousness order, concluding that the defendant could be safely released on conditions including global positioning system monitoring, an order to stay away from the victim, a curfew, and a \$10,000 cash

³ This charge was later dismissed at the request of the Commonwealth.

bail. The defendant was unable to post the bail amount and remained incarcerated.⁴

On December 11, 2019, the defendant was arraigned on the Lynn District Court complaint. The Commonwealth filed a § 58A petition, which was heard on December 16. After the hearing, a Lynn District Court judge ordered the defendant held without bail.

4. Prior motions for release. Jury trials were scheduled for March 30, 2020, in the Chelsea District Court, and April 14, 2020, in the Lynn District Court. Those trial dates were continued due to the COVID-19 pandemic.

Following our decision in Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 1), 484 Mass. 431, S.C., 484 Mass. 1029 (2020), the defendant filed motions for release in both courts. In April 2020, both motions were denied. The defendant also filed an emergency petition for release pursuant to G. L. c. 211, § 3, which was denied in May 2020. In June, in the Chelsea District Court, the defendant filed another motion to reduce his bail, which was denied. Following our decision in Lougee, 485 Mass. 70, the defendant filed a motion for relief in the Lynn District Court, which motion was denied in July of 2020.

⁴ The defendant's motion to reconsider the imposition of unaffordable bail was filed and denied on December 9, 2019.

5. Motions underlying this appeal. In the fall of 2020, the defendant renewed his motions for release. He had suffered from a knee injury while playing basketball at the Nashua Street jail and argued that his inability to receive treatment for the injury while in jail, as well as the continued unavailability of jury trials, constituted changed circumstances. The motions were denied in October in the Chelsea District Court and in December in the Lynn District Court.

In November 2020, the defendant filed a motion in the Superior Court in Suffolk County to reconsider its prior order instating a \$10,000 cash bail. In December 2020, the Suffolk County prosecutor conveyed an offer to defense counsel to resolve the Chelsea case through a change of plea with a recommended split sentence of two and one-half years in the house of correction, nine months to serve, with the balance suspended during a period of probation. Because the defendant had by then been imprisoned for thirteen months, acceptance of the offer would have resulted in release on conditions for the Chelsea case. A Superior Court judge denied the defendant's motion to reconsider.⁵

⁵ The defendant filed an affidavit alerting the court to the proposed resolution, but the judge's order issued before that affidavit was filed.

Later in December 2020, the defendant filed a new petition in the county court requesting release. A single justice of this court transferred the petition to the Appeals Court. With regard to the Chelsea case, the Commonwealth agreed that given the length of the defendant's pretrial detention in relation to the likely sentence if convicted, the bail should be reduced to an amount he could post. With regard to the Lynn case, the Commonwealth opposed any relief.

On March 15, 2021, a single justice of the Appeals Court denied the defendant's petition. In a written order, the single justice addressed the defendant's due process argument, writing:

"In my view, it will be for the Supreme Judicial Court to say when, and if, we reach that point during the present COVID-19 pandemic emergency. Accordingly, at least at this time, I conclude that the defendant's continued detention, which began on October 24, 2019 does not run afoul of statutory or due process limitations.

The defendant filed a timely notice of appeal, and we allowed his application for direct appellate review.

6. Further developments in the trial courts. On March 23, 2021, the parties jointly moved for a bail reduction in the Chelsea District Court. On April 5, 2021, a judge issued an order reducing the defendant's bail to \$2,000 "by agreement" of the parties. On June 2, 2021, a jury trial was held. On the strangulation count, the trial judge entered a required finding of not guilty at the close of the Commonwealth's case. The jury

returned verdicts of not guilty on all remaining charges. See Care & Protection of Zita, 455 Mass. 272, 282 (2009) (court may take judicial notice of docket entries).

The defendant also moved in the Superior Court in Essex County for review of the Lynn District Court's detention order. On April 23, a Superior Court judge declined to hear the petition due to the pendency of this appeal. On May 18, a trial readiness conference was held in the Lynn case. The Commonwealth answered that it was not ready for trial and filed a motion for production of the alleged victim's medical records. It is unclear why the Commonwealth did not file this motion until seventeen months after the defendant's arraignment. The motion was allowed, and the trial readiness conference was rescheduled for June 18.

Discussion. Over one year ago in Lougee, 485 Mass. at 84, we held that prolonged pretrial detention due to delays resulting from the COVID-19 pandemic had not yet reached the length of delay that would trigger a due process analysis. More than one year into the pandemic, we revisit that holding.⁶

⁶ "When a party appeals from an adverse judgment by the single justice under G. L. c. 211, § 3, we review the single justice's order for clear error of law or abuse of discretion." Brangan v. Commonwealth, 477 Mass. 691, 697, S.C., 478 Mass. 361 (2017). The single justice here relied on our decision in Lougee, 485 Mass. at 84, which, as mentioned supra, we now revisit.

Pretrial detention based on dangerousness is constitutional precisely because it is "temporary and provisional" and "the trial itself provides an inevitable end point to the State's preventive authority." Mendonza v. Commonwealth, 423 Mass. 771, 781, 790 (1996). Although delays due to the COVID-19 pandemic constitute excludable delay under § 58A, see Lougee, 485 Mass. at 72, the prolonged length of the delay may, in some cases, upset the careful balancing prescribed by the Legislature in § 58A, see Mendonza, supra at 790 (upholding constitutionality of § 58A and noting Massachusetts Declaration of Rights "allows preventive detention in carefully circumscribed circumstances and subject to quite demanding procedures"). Upsetting this careful balance implicates constitutional concerns.

Due process imposes limits on pretrial detention. See United States v. Salerno, 481 U.S. 739, 747 & n.4 (1987). Because assessing these limits requires fact-specific analysis, we hold that certain defendants are entitled to hearings on motions for reconsideration of § 58A orders to determine whether the length of detention violates due process. See Matter of the Request to Release Certain Pretrial Detainees, 245 N.J. 218, 227 (2021) (Certain Pretrial Detainees) (certain detained defendants whose trials had been postponed due to COVID-19 pandemic had right to reopen detention hearings). We explain precisely what class of defendants this applies to infra.

1. Legal landscape. "Substantive due process prohibits government conduct that 'shocks the conscience,' or interferes with 'rights implicit in the concept of ordered liberty.'" Commonwealth v. G.F., 479 Mass. 180, 195 (2018), quoting Commonwealth v. Fay, 467 Mass. 574, 583, cert. denied, 574 U.S. 858 (2014). "Where the government seeks to infringe on a fundamental right, in order to comply with the requirements of substantive due process, its action must be narrowly tailored to further a compelling and legitimate government interest." G.F., supra, citing Commonwealth v. Aime, 414 Mass. 667, 673 (1993). "The right of an individual to be free from physical restraint is a paradigmatic fundamental right." G.F., supra, quoting Commonwealth v. Knapp, 441 Mass. 157, 164 (2004).

"Pretrial detention schemes necessarily balance the liberty interest of individuals presumed innocent against public safety concerns posed by high-risk defendants." Certain Pretrial Detainees, 245 N.J. at 231, citing Salerno, 481 U.S. at 748-751. "The process is constitutional so long as it serves regulatory rather than punitive purposes." Certain Pretrial Detainees, supra, citing Salerno, supra at 746-748, and Bell v. Wolfish, 441 U.S. 520, 535-540 (1979). But at some point, pretrial detention under a valid regulatory scheme may "become excessively prolonged, and therefore punitive," resulting in a due process violation. Salerno, supra at 747 n.4. See Abbott

A. v. Commonwealth, 458 Mass. 24, 40 (2010) ("Pretrial detention under § 58A was intended to be short lived, ending on the conclusion of a speedy trial"); Mendonza, 423 Mass. at 781.

Where that point is will differ in every case. See Abbott A., 458 Mass. at 28 (due process "varies with context" and is "flexible" [citations omitted]). There is no bright-line limit to the permissible length of a pretrial detention, and thus judges must assess the permissible length of detention on a case-by-case basis. See Certain Pretrial Detainees, 245 N.J. at 240 (defendants held pretrial for six months or longer who could make preliminary showing entitled to hearing regarding whether length of detention violated due process). See also United States v. Torres, 995 F.3d 695, 699, 709 (9th Cir. 2021) (twenty-one month pretrial detention for charges of drug possession with intent to distribute and being felon in possession of ammunition, prolonged due to COVID-19 pandemic, "[did] not yet violate due process, but . . . [was] approaching the limits of what due process [could] tolerate"); State v. Labrecque, 2020 VT 81, ¶¶ 2-3, 29-31 (twenty-five month pretrial detention, prolonged due to COVID-19 pandemic, for child sexual assault charges carrying maximum life sentence did not violate due process).

Due to the fact-specific nature of the inquiry, we remand the defendant's Lynn case for a determination whether his

continued pretrial confinement violates due process.⁷ We use this occasion to set out guidance for judges in the lower courts when addressing potential due process concerns that arise when a defendant's pretrial detention has been prolonged because of the COVID-19 pandemic.

2. Procedure for individualized review. We need not create new procedures here. Section 58A already contains mechanisms for reconsideration. Under § 58A (4), a defendant may file a motion for reconsideration with the court that issued the original detention order. The existing procedure prescribed by the Legislature is an appropriate way for defendants to raise due process concerns.

A defendant may file a motion for reconsideration where there has been a material change in circumstances. See G. L. c. 276, § 58A (4). We have already held that "[a] substantial delay in the commencement of trial may constitute a change in circumstances." Lougee, 485 Mass. at 81.

When deciding a motion for reconsideration, it is imperative that the judge consider "not whether the initial detention decision was correct, but whether the circumstances at the time of the later hearing warrant a defendant's continued detention." Certain Pretrial Detainees, 245 N.J. at 237. Thus,

⁷ As stated supra, we also hold that the defendant's Chelsea case is moot.

judges must make a renewed determination whether the defendant's release will endanger the safety of any other person or the community. See G. L. c. 276, § 58A (2). In making this determination, judges must consider whether the length of pretrial detention has become excessively prolonged and therefore violates due process.

3. Factors to consider. Other jurisdictions that have analyzed the due process concerns of prolonged pretrial detention because of the COVID-19 pandemic have listed various factors to guide judges in determining whether there has been a due process violation. See Torres, 995 F.3d at 708-709; Certain Pretrial Detainees, 245 N.J. at 237-240; Labrecque, 2020 VT 81, ¶¶ 18-29. Considering the reasoning in these cases, as well as our own law, we set out the following factors.

a. The length of detention and the projected length of ongoing detention. First, the judge should consider the length of time the defendant has been detained, as well as the projected length of continuing detention. See Certain Pretrial Detainees, 245 N.J. at 237. See also Abbott A., 458 Mass. at 39; Torres, 995 F.3d at 708; Labrecque, 2020 VT 81, ¶ 29.

Jury trials have now resumed in the Commonwealth. Consequently, a judge may consider the existence of a trial date regarding a defendant's case, although a trial date does not in and of itself necessarily eliminate a potential due process

violation. For example, should the length of a defendant's pretrial detention surpass the likely sentence on the charge if convicted before reaching the trial date, then due process may require releasing the defendant prior to the trial date. See Lougee, 485 Mass. at 81 (change in circumstances where "the duration of pretrial confinement approaches or exceeds the length of sentence a defendant would be likely to receive if he or she were found guilty of the crimes charged"). Cf. Brangan v. Commonwealth, 477 Mass. 691, 709-710, S.C., 478 Mass. 361 (2017) ("when a bail order comes before a judge for reconsideration or review and a defendant has been detained . . . , the judge must consider the length of the defendant's pretrial detention and the equities of the case").

b. The existence and nature of a plea offer. "We anticipate that prosecutors will act in good faith and continue to extend plea offers in the same manner they did before the pandemic." Certain Pretrial Detainees, 245 N.J. at 239. Consequently, like the previous factor, plea offers can bear on how much time a defendant would likely spend incarcerated if there was a change in plea. See id. at 238-239. For example, in the defendant's Chelsea case, the Commonwealth's plea offer was nine months to serve. The defendant had already surpassed that amount. For this reason, that factor would have weighed in favor of release if the Chelsea case had not become moot.

c. Evidence supporting detention under § 58A. Third, the judge should consider the evidence supporting detention under § 58A. See Abbott A., 458 Mass. at 39-40 (degree of dangerousness one factor in totality of circumstances when considering whether length of § 58A detention is unreasonable); Torres, 995 F.3d at 709 (considering evidence supporting detention under Federal Bail Reform Act); Certain Pretrial Detainees, 245 N.J. at 239-240 (considering factors relevant to pretrial detention order).

In addition to the record and order from the initial § 58A hearing, the judge should consider any evidence that may have changed with the passage of time. For example, in Lougee, 485 Mass. at 81, we noted that a delay in trial may affect the strength of the Commonwealth's case "if a key witness recanted his or her inculpatory statement, or if laboratory findings failed to confirm the defendant's participation in the crime, or if further investigation revealed exculpatory evidence or identified a potential third-party culprit." Moreover, we noted that such changes are relevant to the nature and circumstances of the offense under § 58A (5). Id. See Certain Pretrial Detainees, 245 N.J. at 239 (strength of prosecution's case may have changed with passage of time).

d. Specific unfair prejudice to the defendant. Next, the judge should consider whether continued detention would result

in any specific prejudice to the defendant. See Abbott A., 458 Mass. at 40. Prejudice includes, but is not limited to, specific health risks. Heightened risks of contracting COVID-19 while incarcerated fall under this factor. See Certain Pretrial Detainees, 245 N.J. at 239. Cf. Commonwealth v. Nash, 486 Mass. 394, 405-409 (2020), citing Christie v. Commonwealth, 484 Mass. 397, 401-402 (2020) (outlining analysis of COVID-19 factor for defendants seeking stay of sentence). As in Nash, supra at 408-409, this factor may only weigh in favor of the defendant, and the lack of either particularized health risks or a COVID-19 outbreak at a house of correction should not make it more difficult for a defendant to obtain release.

e. The Commonwealth's responsibility for the delay.

Finally, courts have considered the prosecution's responsibility for the delay. While the Commonwealth is clearly not responsible for delays caused by the COVID-19 pandemic, it nonetheless bears the responsibility of bringing the defendant to trial. See Torres, 995 F.3d at 708 (defendant conceded that prosecutor bore no responsibility for delay due to COVID-19 pandemic); Labrecque, 2020 VT 81, ¶ 26 ("Although no malfeasance or neglect underlies the delay [due to COVID-19 pandemic], the government bears the responsibility of bringing defendant to trial, even when it is delayed in the exercise of that responsibility by a public health emergency"). Thus, delays

caused solely by the COVID-19 pandemic are essentially "a wash" and should not be weighed in favor of either party.

If, however, a delay is not solely due to the COVID-19 pandemic -- for example, if the Commonwealth answers that it is not ready for trial -- then that delay would weigh against the Commonwealth. Compare Torres, 995 F.3d at 708-709 (continuances stipulated to for defense counsel's benefit not attributable to prosecution); Labrecque, 2020 VT 81, ¶ 25 ("The United States Supreme Court has recognized that, at least in the context of a federal speedy-trial claim under the Sixth Amendment [to the United States Constitution], delay caused by the actions of a public defender is attributed to the defendant, not the state").

In the defendant's Lynn case, after oral argument in this court and before this decision issued, there was a trial readiness conference in the District Court on May 18, 2021. The Commonwealth answered that it was not ready for trial and filed a motion for production of the alleged victim's medical records. The Commonwealth indicated that it could not properly prepare for trial without such records. There is nothing in the docket indicating why the Commonwealth took seventeen months to file what appears to be a basic motion pursuant to Commonwealth v. Lampron, 441 Mass. 265, 269-270 (2004), and Mass. R. Crim. P. 17, 378 Mass. 885 (1979). Thus, if the Commonwealth is responsible for the delay in the setting of a trial date for an

additional month, that would constitute a fact favorable to the defendant.

4. Right to a hearing. In Lougee, 485 Mass. at 81, we held that a substantial delay in the commencement of trial may constitute a change in circumstance pursuant to § 58A (4). To summarize, we now clarify that defendants are entitled to a hearing on a motion for reconsideration under § 58A (4) if they have been detained for longer than the presumptive time periods in § 58A (3),⁸ and they can make a preliminary showing based on one or more of the due process factors discussed supra. See Certain Pretrial Detainees, 245 N.J. at 240 (right to hearing if detained longer than six months due to COVID-19 pandemic and can make preliminary showing on one or more due process factors). The right to a hearing in these circumstances will ensure individualized review to determine if due process requires release from pretrial detention.

Conclusion. The matter is remanded to the single justice of the Appeals Court for entry of an order vacating the denial

⁸ This time limit is 120 days by the District Court or 180 days by the Superior Court, minus any period of excludable delay under Mass. R. Crim. P. 36 (b) (2), 378 Mass. 909 (1979). G. L. c. 276, § 58A (3). Note, however, that even though delay due to our COVID-19 pandemic emergency orders constitutes excludable delay under the statute, see Lougee, 485 Mass. at 72-73, that portion of the delay should not be included when calculating whether a defendant is entitled to a hearing on a motion for reconsideration.

by the Lynn Division of the District Court Department of the defendant's November 2020 renewed motion for reconsideration and remanding the matter for an immediate hearing in the Lynn Division of the District Court Department. The defendant is free to supplement his motion with further argument consistent with this opinion.

So ordered.